(17)

96-992

No. 95-992

Supreme Court, U.S.
FILED
APR 26 1996
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLANTS TURNER BROADCASTING SYSTEM, INC., *ET AL.*

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QUESTION PRESENTED

Whether, in the absence of any jeopardy to the health of the overall system of free, local broadcast television (nationally or in particular markets), the First Amendment allows Congress to impose on cable operators a requirement of mandatory carriage of local broadcast stations in preference to all other programmers.

PARTIES TO THE PROCEEDINGS

Plaintiffs: *

Atlanta Interfaith Broadcasters, Inc.
A&E Television Networks
Black Entertainment Television, Inc.
Daniels Cablevision, Inc.
Discovery Communications, Inc.
E! Entertainment Television, Inc.
Lifetime Entertainment Services
International Family Entertainment, Inc.
The Learning Channel, Inc.
National Cable Satellite Corporation d/b/a C-SPAN
National Cable Television Association, Inc.
National Interfaith Cable Coalition, Inc.
QVC, Inc.
Time Warner Entertainment Company, L.P.
The Travel Channel, Inc.
Turner Broadcasting System, Inc.
USA Networks

Defendants:

Association of America's Public Television Stations
Association of Independent Television Stations, Inc.
Community Broadcasters Association
Consumer Federation of America
The Corporation for Public Broadcasting
Sandra Engle
Federal Communications Commission
The International Association of Machinists and Aerospace Workers, AFL-CIO
International Broadcasting Network
The International Television Broadcasting, Inc.
Morningstar Communications
National Association of Broadcasters

* Appellants' Rule 29.6 disclosure statements are set forth in the Appendix to the Jurisdictional Statement at 144-148a.

National Council of Senior Citizens
National Rural Telecommunications Cooperative
Office of Communication of the United Church of Christ
Paging Associates, Inc.
The Public Broadcasting Service
Sherjan Broadcasting Co., Inc.
Triplett & Associates, Inc.
TV 14, Inc.
TV 58 St. Louis, Inc.
United States of America
Zantech, Inc.

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BRIEF FOR APPELLANTS
TURNER BROADCASTING SYSTEM, INC., *ET AL.*

OPINION BELOW

The opinion of the three-judge district court is reported at 910 F. Supp. 734 (D.D.C. 1995). The opinion of this Court remanding the case to the district court is reported at 114 S. Ct. 2445 (1994) and reprinted in the Appendix to the Jurisdictional Statement ("J.S. App.") at 1a-112a. The prior opinion of the district court is reported at 819 F. Supp. 32 (D.D.C. 1993).

JURISDICTION

The order of the district court was entered on December 12, 1995. J.S. App. 1a. The judgment was entered on December 20, 1995. J.S. App. 153a. A timely notice of appeal was filed in the district court on December 21, 1995. J.S. App. 149a. This Court has appellate jurisdiction under 28 U.S.C. § 1253. Section 23 of the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act" or "Act"), 47 U.S.C. § 555(c)(1), requires that challenges to sections 4 and 5 of the Act "be heard and determined by a district court of three judges convened pursuant to [28 U.S.C. § 2284]." This Court noted probable jurisdiction on January 16, 1996.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." Sections 4 and 5 of the Cable Act, 47 U.S.C. §§ 534 & 535, together with other relevant provisions of the Act, are reprinted at J.S. App. 113-143a.

STATEMENT OF THE CASE

The history of this case is explained comprehensively in Justice Kennedy's opinion for the Court in *Turner*

Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445, 2451-56 (1994) ("*Turner*"). Appellants represented on this brief are providers of cable programming services—commonly known as cable program networks—who disseminate a diverse array of video speech almost exclusively through means of cable television systems.[1] Appellants initiated this action in 1992, challenging the constitutionality of the "must-carry" provisions of Sections 4 and 5 of the Cable Act, 47 U.S.C. §§ 534 & 535. The must-carry provisions reduce the opportunities for cable programmers to speak by requiring cable operators to devote up to one third or more of their systems' channel capacity to carriage of local television broadcast stations. A three-judge panel of the district court, by a 2-1 vote, upheld the challenged provisions.[2] Upon review, this Court vacated that judgment and remanded the case for further proceedings. On remand, the district court, by a split decision, again sustained the provisions.[3]

By a 5-4 vote, this Court found in *Turner* that the must-carry provisions burden the fully protected speech rights of cable programmers and cable operators, and held that the appropriate standard by which to assess the provisions is the "intermediate" level of First Amendment scrutiny set forth in *United States v. O'Brien*, 391 U.S.

[1] The plaintiffs joining this brief are companies that operate 22 cable program networks, including Cable News Network, Headline News, Turner Network Television, The Cartoon Network, Turner Classic Movies, Cable News Network International (now CNN-FN), A&E Network, The History Channel, BET Cable Networks, BET on Jazz, E! Entertainment Television, Lifetime Television Network, The Family Channel, The Cable Health Club, C-SPAN, C-SPAN 2, QVC, Q2, The Travel Channel, USA Network, the SCI-FI Channel, and Atlanta Interfaith Broadcasters, Inc. *See* Amended Complaint, No. 92-2447, filed November 5, 1992.

[2] *Turner Broadcasting System, Inc. v. FCC*, 819 F. Supp. 32 (D.D.C. 1993) (Williams, J., dissenting; Sporkin, J., concurring).

[3] *Turner Broadcasting System, Inc. v. FCC*, 910 F. Supp. 734 (D.D.C. 1995) (Williams, J., dissenting; Jackson, J., concurring in the result).

367 (1968). 114 S. Ct. at 2469. This Court thus required the Government to show that the must-carry regime (1) furthers a substantial content-neutral governmental interest; and (2) is narrowly tailored to burden no more speech than necessary to serve the Government's legitimate interests. *Id.*

Congress enacted must-carry because it believed that absent mandatory carriage requirements, "the economic health of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized."[4] In 1993, the Government told the district court that Congress' interest in must-carry was "in protecting this country's broadcast industry."[5] Likewise, the Solicitor General told this Court in 1993 that Congress' interest was "in preserving the local broadcasting industry."[6] This Court thus determined that the provisions were "designed to guarantee the survival of a medium that has become a vital part of the Nation's communication system, and to ensure that every individual with a television set can obtain access to free television programming."[7]

[4] Cable Act, § 2(a)(16). *See also id.* at § 2(a)(10) ("A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial Governmental interest in ensuring its continuation."); *id.* at § 2(a)(12) ("There is a substantial Governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming."); Plaintiffs' Joint Statement of Undisputed Facts Established By The Record ("Pl. Jt. St. Facts"), ¶ 106 n.2 (listing relevant references to the local broadcasting *system* in Senate and House Reports).

[5] Govt. Mem. in Support of Motion to Dismiss at 3 (Feb. 12, 1993).

[6] Brief for the Federal Appellees at 39 (Dec. 1993).

[7] *Turner*, 114 S. Ct. at 2461. *See also id.* at 2467 ("Congress granted must-carry privileges to broadcast stations on the belief that the broadcast television industry is in economic peril"); *id.*

In assessing the Government's interest in preserving the system of broadcast television, a plurality of this Court found that interest important when "viewed in the abstract." *Id.* at 2469. But the plurality made clear that when the Government seeks to defend a regulation that burdens free speech, "it must do more than 'simply posit the existence of the disease sought to be cured.'" *Id.* at 2470 (internal citation omitted). The Government must "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.*

On the state of the record then before this Court, the plurality faulted the "paucity of evidence" presented by the Government and concluded that it could not resolve the case without development of a more thorough factual record. *Id.* at 2472. The plurality thus remanded the case for additional fact-finding under three discrete inquiries. *First*, to determine, as a threshold matter, "whether the Government has adequately shown that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry." *Id.* at 2470. *Second*, assuming satisfaction of the Government's threshold burden, to analyze whether the must-carry rules "suppress 'substantially more speech than . . . necessary' to ensure the viability of broadcast television" by measuring the actual effects of must-carry on the speech of cable programmers and operators. *Id.* at 2472 (internal citation omitted). *Third*, to assess the "availability and efficacy of 'constitutionally acceptable less restrictive means' of achieving the Government's asserted interests." *Id.*

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at 2471 (the issue before the Court is whether "the must-carry rules are necessary to protect the viability of broadcast television"); *id.* at 2478 (Stevens, J., concurring in the judgment) (the "overriding congressional purpose" of the must-carry provisions is to "guarantee the survival of a medium," "protect[] access to television" and preserve "the viability of broadcast television").

A. The Evidence on Remand.

As directed by the plurality opinion, the record now contains detailed information regarding the viability of broadcast television in the absence of must-carry; the actual effects of must-carry on the speech of cable programmers and cable operators; and the availability and efficacy of less restrictive alternatives to the existing must-carry regime.

1. *The Health of Local Broadcasting.*

The record shows that there was no "disease to be cured" by Congressional intervention. Even without must-carry, cable operators voluntarily carry virtually all broadcast stations with any measurable viewing in non-cable households. The broadcast system was thriving and grew markedly during the period without must-carry. In fact, commercial broadcasters were so confident of their ability to secure voluntary cable carriage that most opted to demand compensation for retransmission of their signals rather than utilize must-carry.

a. *Widespread Station Carriage in the Absence of Must-Carry.*

The Government in *Turner* relied heavily on a 1988 FCC survey that purported to assess broadcast station carriage patterns on cable television.[8] The 1988 FCC Carriage Survey provides raw information concerning the number of instances that any broadcast station was dropped from any cable system, for any reason, after the FCC's first must-carry rules were found to violate the First Amendment.[9] For the period examined, the Survey

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[8] FCC Staff Report, Policy and Rules Division, Mass Media Bureau, *Cable System Broadcast Signal Carriage Survey Report*, Sept. 1, 1988 (the "1988 FCC Carriage Survey") (J.A. 36-64); *see Turner*, 114 S. Ct. at 2471-72.

[9] *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1453 (D.C. Cir. 1985).

found a total of 776 drops and 757 denials of carriage. Yet nearly 80% of the responding cable systems reported not a single instance of having dropped or denied carriage to any broadcast station.[10] Similarly, nearly 70% of the responding television stations reported not one instance of having been dropped or denied carriage by any cable system.[11]

The *Turner* plurality recognized the limitations of the Survey, and faulted the absence of evidence concerning "the time frame in which these drops occurred, or how many of these stations were dropped for only a temporary period and then restored to carriage." 114 S. Ct. at 2471. No evidence has been introduced by the Government on remand to address these concerns.

Perhaps the most telling evidence that Congress could not appropriately base its predictive judgment on the 1988 FCC Carriage Survey was the analysis of the Survey conducted by the staff of the Federal Trade Commission ("FTC") in 1991.[12] The FTC found that "most cable systems voluntarily carry all of their former must-carry stations" and that "most episodes of non-carriage have involved distantly-located (and duplicated) network signals and relatively low-rated commercial independent stations." *Id.* at 30 (J.A. 185). The FTC also found that 39% of the instances of non-carriage (defined as one adverse action on one cable system) for non-network affiliated commercial stations (191 of 485 instances) were of stations with no measurable viewership in their Area of Dominant Influence ("ADI"). *Id.* at 14 (J.A. 172). The FTC observed that fewer than 5% of the instances of non-carriage for non-network affiliated commercial stations (20 of 485 instances) were of stations with a viewership ranking of better than second to last in their ADI.[13]

The record developed on remand beyond what was available to Congress demonstrates that even without Congress' intervention, cable operators carried virtually all broadcast stations with any viewing audience. In the absence of must-carry, cable operators carried approx-

[10] *See* 1988 FCC Carriage Survey, Tables 2 & 3 (J.A. 48 & 49).

[11] *Id.*, Table 3; *see also* Defendants' Response to Pl. Jt. St. Facts ("Def. Fact Response"), ¶ 23. In 1988, there were 8,500 cable systems. All Parties' Joint Statement of Undisputed Facts ("Jt. Stip. Facts"), ¶ 136. The average cable system at that time carried somewhere between 7 and 11 local broadcast stations. Declaration of Gregory L. Klein ("Klein Decl."), ¶ 15 (J.A. 1139) (CDC data indicates over 7 broadcast stations carried per cable system); Second Declaration of Stanley M. Besen ("Second Besen Decl.") at 13 n.21 (J.A. 1821) (1990 GAO Report indicates 8.9 broadcast stations available to the average cable subscriber in 1989); *id.* (1988 FCC Carriage Survey, weighted by subscribers, yields on average approximately 11 broadcast stations carried per system). Multiplying the number of cable systems (8,500) by the *minimum* average number of broadcast stations carried (7) yields a *minimum* of 59,500 instances of broadcast station carriage in 1988 alone. More than 33% of the stations reporting instances of drops or denials of carriage indicated that the alleged action had occurred with respect to only a single cable system. 1988 FCC Carriage Survey, Table 3 (J.A. 50).

[12] *Reply Comment of the Staff of the Bureau of Economics and the San Francisco Regional Office of the Federal Trade Commission*, MM Docket No. 90-4 (Nov. 1991) ("1991 FTC Staff Analysis") (J.A. 157-185).

[13] *Id.* at 14-15 (J.A. 172). Of the instances in which a network affiliate had been dropped by a cable system, the FTC determined that 70% of those instances (417 of 595) involved a network affiliate from an ADI different from that of the cable system. The FTC also found that "most of the network affiliates that were denied carriage may have been relatively remote stations that substantially duplicated the programming of another network affiliate." *Id.* at 13 (J.A. 170). Systems that had dropped a network affiliate had continued to offer their subscribers "roughly the same number of network affiliates, about 4, as did those systems that did not drop any stations." *Id.* (J.A. 171) Similarly, systems that had dropped a public television station were found to have continued offering their subscribers "roughly the same number of public stations (about 2) as were offered by systems that did not drop any stations." *Id.* at 14 (J.A. 171).

imately 90% of all local television stations with any reportable ratings *in non-cable households.*[14] Moreover, the typical cable subscriber in 1992, in the absence of must-carry, was served by a cable system that carried those local broadcast stations accounting for virtually all viewing (97-98%) in non-cable households (based on 1994 viewing data).[15] The record also demonstrates that cable systems in 1992, in the absence of must-carry, voluntarily carried over 30% of local stations with *no* reportable ratings in non-cable households.[16]

b. *Growth in the Number of Broadcast Stations.*

As Judge Williams recognized, one "way to measure the health of the broadcast industry is through the number of stations. More stations presumably translate to more choices for viewers of over-the-air television." [17] Data compiled by the FCC shows that the total number of full power television stations in operation between 1985 (when *Quincy* was decided) and 1992 increased by approximately 22%, from 1,235 stations in 1985 to 1,506 stations in 1992.[18]

On remand, the Government introduced no evidence to show the overall number of stations that fell into bank-

[14] Declaration of Stanley M. Besen ("Besen Decl.") at 44, 53 (J.A. 809, 818); Second Besen Decl. at 2-3 (J.A. 1812); Affidavit of Linda McLaughlin, ¶ 28 (J.A. 2185). To eliminate any possibility that non-carriage of a broadcast station could have reduced the station's ratings in non-cable households, Dr. Besen used Nielsen ratings data from 1994, a period during which must-carry was in effect. Although appellees challenge the accuracy of the Nielsen data, *see, e.g.*, Def. Fact Response, ¶ 8, they offer no alternative data. *See* J.S. App. 70a (Williams, J., dissenting).

[15] Besen Decl. at 41 (J.A. 808); Second Besen Decl. at 3 (J.A. 1812); Third Declaration of Stanley M. Besen ("Third Besen Decl.") at 1, 14 (J.A. 2027, 2037-38).

[16] Besen Decl. at 42 (J.A. 809).

[17] J.S. App. 55a (Williams, J., dissenting).

[18] Besen Decl., Exh. 5 (J.A. 850-53).

ruptcy in the absence of must-carry.[19] Nor did the Government present any evidence purporting to show how many television markets lost broadcast station licenses in the absence of mandatory carriage.[20] Similarly, the Government presented no evidence to show that the financial difficulties allegedly experienced by independent UHF television stations between 1985 and 1992 were caused by an absence of must-carry, as opposed to other economic factors such as general economic downturns or the entry of new television stations.[21]

c. *Retransmission Consent Elections.*

Any Congressional judgment that broadcasting needed must-carry to survive has been belied by events occurring after the passage of the 1992 Cable Act. Most commercial stations opted to forego must-carry and instead ransom their signals to the cable operators (and subscribers) under the Act's retransmission consent provision (47 U.S.C. § 325(b)).

NAB statistics found that in 1993, over 80% of all commercial television stations had elected retransmission consent on one or more cable systems in their television market.[22] Of these stations, more than 90% of network affiliates elected retransmission consent.[23] Fox network

[19] J.S. App. 56a (Williams, J., dissenting).

[20] *Id.*

[21] *Id.* at 61a.

[22] Jt. Stip. Facts, ¶¶ 120-21.

[23] *Id.*; *see also* Time Warner App., Exh. 22 (*More than 90% of Affiliates Choose Retransmission Consent*, TV Today (July 19, 1993)) (J.A. 248). Similarly, data compiled in 1994 by Arthur D. Little on behalf of appellants found that local commercial broadcast stations elected retransmission consent, not must-carry, 62% of the time. Declaration of Peter D. Shapiro ("Shapiro Decl."), Exh. 2, Carriage of Must-Carry TV Broadcast Stations, at 2 (J.A. 672).

affiliates elected retransmission consent almost exclusively (98.2% of the time).[24]

2. *The Harm to Cable Programmers and Cable Operators Inflicted by Must-Carry.*

The evidence developed on remand shows that channel capacity on cable systems remains scarce; that must-carry stations occupy a significant portion of that capacity, thereby reducing the number of channels available for carriage of cable network programming; and that numerous cable programmers have been and are continuing to be displaced from carriage and foreclosed from disseminating speech to their intended audiences on thousands of cable channels serving millions of potential subscribers.

a. *Cable System Channel Constraints.*

Cable operators select programming to fill available channels from a variety of sources, including local broadcast television stations, distant television stations, locally-originated cable programming, and cable network programming.[25] Because cable program networks are distributed almost exclusively through cable systems, they reach only the approximately 64 percent of television homes that subscribe to cable television.[26] Broadcasters, by contrast, utilize portions of the electromagnetic spectrum free-of-charge to transmit over-the-air signals to virtually every home within their licensed service areas, even without cable carriage.

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[24] Jt. Stip. Facts, ¶¶ 120-21.

[25] Declaration of Carter P. Maguire, Jr. ("Maguire Decl."), ¶ 11; Declaration of William B. Padalino ("Padalino Decl."), ¶ 5; Declaration of Debra L. Green ("Green Decl."), ¶ 7.

[26] *See, e.g.*, Maguire Decl., ¶ 13; Green Decl., ¶ 4; Klein Decl., ¶ 16 (J.A. 1139); *see also* 1992 Cable Act § 2(a)(3).

All cable television systems operate with finite channel capacity.[27] The average capacity of cable systems is approximately 43 channels, not much greater than the average capacity of 40 channels present at the time of *Turner*.[28] As of October 1, 1994, 86% of U.S. cable systems had a maximum channel capacity of less than 54 channels, and 22% had a capacity of less than 30 channels.[29] At present, more than 160 national and regional cable program networks provide a diverse mix of news, entertainment, public affairs, sports, financial, religious, minority-oriented and children's programming.[30] Furthermore, at least 40 national cable program networks have announced plans to launch new services.[31]

Although the channel capacity of some cable systems has increased since passage of the 1992 Cable Act, in December 1994, cable systems serving approximately 67% of the Nation's cable subscribers still had no available capacity.[32] Historically, the number of cable programmers seeking carriage on the average cable system has exceeded the system's channel capacity, and, for the foreseeable future, the number of available programming serv-

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[27] *See, e.g.*, Klein Decl., ¶ 8 (J.A. 1137); Declaration of Daniel E. Davids ("Davids Decl."), ¶ 7.

[28] *Compare* Shapiro Decl., Exh. 1, Avaliability of Channels in U.S. Cable Systems, at 9 (J.A. 662) (measuring average capacity as of November 1994) with Affidavit of Gregory L. Klein (Feb. 12, 1993), ¶ 7.

[29] Klein Decl., ¶ 8 (J.A. 1137); Affidavit of John F. Gault, ¶¶ 8-12.

[30] *See Turner* plaintiffs' Statement of Material Facts As To Which There Is No Genuine Issue at 20; Maguire Decl., ¶ 14; Green Decl., ¶ 7; Padalino Decl., ¶ 6.

[31] *Id.*

[32] *See* Shapiro Decl., Exh. 1 at 9-10, Table II-2: Availability of Cable Channels (J.A. 663); *see also* Second Declaration of Peter D. Shapiro, ¶¶ 2-4, 10 (there is no evidence that the number of systems without excess capacity has diminished since that time).

ices will exceed cable systems' channel capacity in all but a few systems.[33]

Because most cable systems have little or no available channel capacity, competition among the scores of cable program networks seeking carriage on cable systems is intense, especially for newer networks like CNN-FN, The Cartoon Network, The History Channel, BET on Jazz, Sci-Fi Channel, and The Cable Health Club, and for planned networks like CNN-SI and C-SPAN 3.[34]

b. *Channels Occupied By Must-Carry.*

By November 1994, approximately 50% of cable subscribers were served by cable systems that had been forced to *add* local television stations occupying approximately 5,500 to 6,000 cable channels.[35] Moreover, as of the 1992 Cable Act, virtually every cable system already carried one or more local television stations that then invoked the protections of must-carry, thereby guaranteeing themselves permanent carriage by eliminating the operators' discretion to replace them.[36] By appellees' own estimate, incumbent must-carry stations occupy approximately 30,000 channels *in addition to* the thousands of channels now occupied by stations that were added by must-carry.[37]

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[33] *See* Klein Decl., ¶ 11 (J.A. 1138); Affidavit of E. Thayer Bigelow, ¶ 5 (J.A. 1053).

[34] *See, e.g.*, Declaration of Betty Cohen ("Cohen Decl."), ¶ 19; Davids Decl., ¶¶ 13-20; Declaration of Douglas V. Holloway ("Holloway Decl."), ¶¶ 7-12; Declaration of Craig Ronald Sherwood ("Sherwood Decl."), ¶¶ 8-10; Declaration of Curtis N. Symonds ("Symonds Decl."), ¶¶ 9-10.

[35] *See, e.g.*, Shapiro Decl., Exh. 2 at 10-11, Table II-2: Addition of Must-Carry TV Stations (J.A. 675); Meek Decl., ¶ 23 (J.A. 624).

[36] Shapiro Decl., Exh. 2 at 15 (J.A. 680).

[37] *See* Defendants' Joint Statement in Response to Court's Order of July 17, 1995 ("Def. Jt. St."), ¶¶ 151-152 (estimating 17,770 channels occupied by local commercial must-carry stations and 12,235 channels occupied by local public stations).

c. *Must-Carry's Effects On Cable Programmer Speech.*

As a consequence of must-carry, cable programmers providing service to millions of potential viewers have been, and are continuing to be, dropped from cable carriage, prevented from gaining new or expanded carriage, reduced from full-time to part-time status, and repositioned to less favorable channel positions on cable systems that have been required under the law to carry local television stations.[38]

d. *Continuing Adverse Consequences.*

The impact of must-carry is not merely transitory. As the record establishes, other factors will continue to exacerbate must-carry's impact on speech. *First*, must-carry obligations expand with a system's channel capacity. Therefore, any increased channel capacity also increases an operator's must-carry liability.

Second, on October 18, 1994, President Clinton signed into law the Satellite Home Viewer Act of 1994 ("SHVA").[39] The SHVA expanded the definition of a broadcast station's "local service area" for purposes of the cable compulsory copyright license to encompass the station's ADI.[40] This change in the copyright law has

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[38] *See, e.g.*, Maguire Decl., ¶¶ 24-26; Declaration of Lisa A. Kerr ("Kerr Decl."), ¶¶ 10-11; Symonds Decl., ¶¶ 9-11; Declaration of Irving Kalick ("Kalick Decl."), ¶¶ 8, 10; Davids Decl., ¶¶ 20-22; Declaration of Dana A. Michaelis ("Michaelis Decl."), ¶¶ 9-11.

[39] Satellite Home Viewer Act of 1994, Pub. L. No. 103-369, 108 Stat. 3477, *amending* 17 U.S.C. § 111(f).

[40] Jt. Stip. Facts, ¶ 128. Prior to the SHVA, a station claiming must-carry rights within its ADI may have been considered "distant" for copyright purposes, in which case the station would not have been entitled to mandatory carriage on a cable system unless it agreed to indemnify the cable operator for all increased copyright costs associated with the station's carriage. *Id.*, ¶ 129. As a result of the SHVA's amended "local service area" definition, all must-carry stations within an ADI are now considered local for copyright purposes. *Id.*, ¶ 130.

generated new must-carry requests from local broadcast stations that previously had not demanded mandatory carriage.

Third, under Section 4 of the Act, television broadcast stations (and cable operators) may, upon written request, petition the FCC to modify the market of a particular television station to include additional communities with the market or exclude certain communities from the market.[41] The addition of communities to a broadcast station's ADI entitles the station to assert mandatory carriage and channel positioning rights on cable systems located in those communities.[42] Many broadcast stations have filed petitions to modify their television markets in order to expand their mandated carriage rights.[43]

Fourth, the FCC is continuing to allot new channels for television stations, and new broadcast stations continue to come on the air.[44]

Fifth, the Cable Act's must-carry provisions authorize the FCC to grant must-carry status to additional spectrum. Broadcasters are now petitioning the FCC to grant them access to, and must-carry status for, additional spec-

[41] *Id.*, ¶ 46.

[42] *Id.*, ¶ 48.

[43] *See Klein Decl.*, ¶¶ 28-29 (J.A. 1143-44).

[44] *See, e.g., Amendment of Section 73.606(b) Table of Allotments, TV Broadcast Stations, (Sioux Falls, South Dakota)*, 11 FCC Rcd. 1069 (Jan. 26, 1996) (alloting UHF Television Channel 46 as the community's sixth local commercial television service); *(Albion, Nebraska)*, 10 FCC Rcd. 3183 (March 21, 1995), *recon. denied*, FCC 95-265 (June 27, 1995) (alloting UHF Television Channel 24+ despite objection that there was "no demonstrated demand for additional television service" and that the allotment "makes no economic sense"); *(Walla Walla, Washington)*, 9 FCC Rcd. 3041 (June 28, 1994) (substituting VHF Channel 9+ for vacant UHF Channel 14−, which is fallow due to signal interference from adjacent land mobile communications); *(Virginia Beach, Virginia)*, DA 96-433 (April 24, 1996) (allotting UHF Television Channel 21).

trum.[45] If granted, each broadcast station may be allowed to generate multiple must-carry signals, thereby further exacerbating the impact of the statute.

3. *Less Restrictive Alternatives.*

During remand, a record was developed regarding "the availability and efficacy of 'constitutionally acceptable less restrictive means' of achieving the Government's asserted interests."[46]

a. *The Century Rules.*

In 1987, the D.C. Circuit invalidated as unconstitutional the must-carry rules that had been endorsed by the commercial broadcasters and promulgated by the FCC.[47] Nonetheless, in 1992, Congress substantially expanded the scope of must-carry without explanation. Each expansion resulted in greater First Amendment injury to cable programmers and operators:

- The *Century* rules required 25 percent of cable channel capacity to be set aside for must-carry stations and excluded cable systems with fewer than 21 channels from any must-carry obligations. The current must-carry statute requires cable systems to allocate up to 33 percent of their channel capacity for the carriage of commercial stations, with a limited exception for systems with fewer than 12 channels and 300 subscribers. Moreover, the present must-carry requirements impose carriage obligations for non-commercial stations above and beyond the one-third capacity allocation required for commercial stations.[48]

- The *Century* rules imposed a set-mileage requirement of 50 miles for a station to qualify for man-

[45] *Advanced Television Systems and Their Impact Upon The Existing Television Broadcast Service*, 10 FCC Rcd. 10540, 10552-54 (1995).

[46] *Turner*, 114 S. Ct. at 2472 (internal citation omitted).

[47] *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1988) (the "*Century* rules").

[48] Klein Decl., ¶¶ 21-28 (J.A. 1141-44).

datory cable carriage. The 1992 Cable Act uses an ADI criterion for commercial stations, which often covers an area much larger than 50 miles and allows a greater number of broadcast stations to qualify for mandatory carriage.[49]

- The *Century* rules included a minimum viewership standard, which the current law does not. The absence of any viewership standard allows broadcast stations with little or no local viewership to assert mandatory carriage rights.[50]

- The *Century* rules gave cable operators discretion to select the channel position upon which to carry must-carry stations, subject to placement on the system's basic service tier. The 1992 Cable Act eliminated this discretion and instead, gives broadcasters the unilateral right to select a channel position from among various alternatives, including a channel position more favorable than a station's over-the-air number assigned by the FCC.

The differences between the *Century* rules and the 1992 must-carry provisions are not theoretical. As the record now shows, much of the impact on speech is directly attributable to the differences. In fact, 86 percent of the television stations *added* to the cable systems because of must-carry would not have qualified for mandatory carriage under the *Century* rules.[51]

b. *A/B Switches.*

Local television stations not carried on a cable system generally can be viewed by cable subscribers through the

[49] *Id.* Some ADIs include portions of several states and are hundreds of geographic miles wide. *Id.*, ¶ 27 (J.A. 1143). Although the must-carry provisions require local broadcasters to deliver to the cable system "a signal of good quality," 47 U.S.C. § 534(h)(1)(B)(iii), broadcast stations may deliver their signals to cable systems within an ADI using mechanisms such as fiber optics and microwave relays to qualify for must-carry, and some have qualified in this manner. *Id.*, ¶ 28 (J.A. 1143); Maguire Decl., ¶ 16.

[50] Klein Decl., ¶ 22 (J.A. 1141-42).

[51] *Id.*, ¶ 25 (J.A. 1142-43).

use of an appropriate antenna and an A/B switching device.[52] Most cable-ready TV receivers now on the market have built-in A/B switches operable by remote control.[53] In the alternative, external A/B switches are inexpensive and widely available for purchase from hardware stores and consumer electronics stores nationwide.[54]

The evidence shows that subscribers will use A/B switches readily in order to obtain desired broadcast television programming. For example, after passage of the 1992 Cable Act, the affiliates of the three major television networks in Corpus Christi, Texas (ABC, CBS and NBC) initially failed to reach retransmission-consent agreements with the local cable system. Consequently, all three networks were dropped from the system temporarily, but were restored to carriage after approximately six weeks. To assist subscribers in obtaining off-air access to TV network programming during the interim period, the cable system distributed 40,000 A/B switches to cable subscribers.[55] After a month without cable carriage, the three networks had an aggregate audience share of between 67% and 69%, as compared with the 70% audience share they had enjoyed while on cable.[56]

The efficacy of the A/B switch is further evidenced by the growth of other media outlets that rely on A/B switches for subscriber access to local broadcast programming. For instance, the three current providers of Digital

[52] Affidavit of Joseph L. Stern ("Stern Aff."), ¶ 53 (J.A. 773); Affidavit of David J. Large ("Large Aff."), ¶¶ 9-10 (J.A. 1217); Defendants' Response to Discovery's Statement of Material Facts ("Def. Resp. to Disc. St. Facts"), ¶ 20.

[53] Large Aff., ¶¶ 16-17 (J.A. 1220).

[54] *Id.*, ¶¶ 19-20, 22 (J.A. 1221-22); Stern Aff., ¶ 47 & Exh. 5 (J.A. 772). For example, a remote-controlled A/B switch is available from Radio Shack at a price of $39.99. Supplemental Affidavit of David J. Large, ¶ 8 & Exh. 4 (J.A. 1774).

[55] Large Aff., ¶ 71 (J.A. 1240).

[56] *Id.*, ¶ 72 (J.A. 1240-41).

Broadcasting Service ("DBS") had approximately 1.5 million customers in 1994, and are projected to have approximately 2.2 million customers in 1995.[57] DBS providers rarely carry local broadcast television signals. Instead, many DBS customers maintain their own off-air reception capability and switch back and forth between satellite reception and local off-air reception of broadcast TV stations.[58] Similarly, Multichannel Multipoint Distribution Service ("MMDS") providers, often called "wireless cable," served approximately 430,000 subscribers in 1994, and are projected to serve approximately 620,000 subscribers in 1995.[59] MMDS providers usually carry few, if any, local broadcast signals and their subscribers generally must watch local broadcast stations through the use of an antenna and an A/B switch.[60]

c. *Mandatory Leased Access and Complaint Procedures.*

The record on remand established that in June 1994, the NAB proposed to the FCC, as alternatives to the must-carry requirements, leased access and FCC complaint procedures, the latter of which was promoted as "a remedy similar to that which might be available in an antitrust suit but with lower costs and without many of the difficulties." [61]

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[57] *Id.*, ¶ 73 (J.A. 1241).

[58] *Id.*; Stern Aff., ¶ 33 (J.A. 767). Depending on the DBS service provider, the mechanism for switching between satellite and local broadcast reception may be furnished as a part of the satellite receiver or may consist of a stand-alone A/B switch. Large Aff., ¶ 73 (J.A. 1241). The Hughes DBS receiver, used by DirecTV, incorporates an electronic A/B switch operable by remote control. Deposition of David Large at 140; Def. Resp. to Disc. St. Facts, ¶ 38.

[59] Large Aff., ¶ 74 (J.A. 1241).

[60] *Id.*; Stern Aff., ¶ 33 (J.A. 767).

[61] *See* NAB Doc. 4010738 (*Turner* plaintiffs' Mem., Exh. V).

4. ***The Decision Below.***

The three-judge district court upheld the must-carry provisions. Judge Sporkin concluded that defendants were entitled to summary judgment. Circuit Judge Williams dissented, concluding that summary judgment should have been entered for plaintiffs. Judge Jackson, in a separate concurrence, opined that a trial was necessary, but joined in the result reached by Judge Sporkin to avoid "prevail-[ing] by stalemate." [62]

Notwithstanding this Court's instruction to ascertain whether "the must-carry rules are necessary to protect the viability of broadcast television" (*Turner*, 114 S. Ct. at 2471), Judge Sporkin concluded that "[t]he relevant inquiry is whether the health of *those broadcasters protected by the must-carry provisions* would be in jeopardy without the provisions." [63] After thus recasting Congress' interest, Judge Sporkin found, based largely on evidence already found deficient by the plurality in *Turner*, that a " 'significant' number of broadcast stations would be refused carriage" absent the must-carry provisions, *id.* at 13a, and that broadcast stations denied cable carriage would be harmed. *Id.* at 15-18a. In his evaluation of the "actual effects" of must-carry, Judge Sporkin dismissed the evidence that must-carry has foreclosed programmer speech from millions of viewers, because he found that technological advances will, at some point, increase the channel capacity of cable systems, " 'thereby rendering must-carry a problem of the past.' " *Id.* at 18-19a, 21-22a (*quoting Turner*, 819 F. Supp. at 54 n.5). Finally, Judge Sporkin summarily dismissed as "less effective" the more narrowly tailored alternatives offered as evidence of the "availability and efficacy of 'constitutionally acceptable less restrictive means' " (*Turner*, 114 S. Ct. at 2472) (internal citation omitted).

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[62] J.S. App. 33a (Jackson, J., concurring).

[63] J.S. App. 6a (emphasis added).

Judge Jackson would have preferred to "deny both cross-motions for summary judgment and set this case for trial." *Id.* at 33a (Jackson, J., concurring). Unwilling, however, to "prevail by stalemate" as a "minority of one," Judge Jackson "elect[ed] to concur" with Judge Sporkin so that the case could be decided. *Id.*

Judge Williams interpreted this Court's mandate to require a determination of whether must-carry is needed to protect the survival of free broadcast television (*id* at 42-43a, 46-48a), and found no dispute among the parties "that there is no real threat to the continued viability of broadcast television, either now in existence or looming on the horizon," *id.* at 40a, because appellees had "unequivocally concede[d] . . . that the evidence they have introduced on remand does *not* show that the health of the broadcast industry as a whole is in danger." *Id.* at 48-49a (emphasis in original). Indeed, Judge Williams noted the undisputed evidence showing sustained growth in broadcast advertising revenues (*id.* at 50-55a), the number of broadcast stations (*id.* at 55-59a), and broadcast profitability (*id.* at 55-61a).

Judge Williams then determined that the harm to cable programmer speech from must-carry is "substantial," *id.* at 93a, and that "every *benefit* to a broadcast station (through being added or being sheltered against removal) is matched by an *injury* to a cable operator (in lost choice and possible lost revenue) and programmer (through being dropped or, thanks to a broadcaster's must-carry entitlement, not added)." *Id.* at 92a (emphasis in original). He also recognized that expanding channel capacity would never eliminate the harm to programmers, because "the marginal opportunity cost of channels will presumably never fall to zero and because broadcast stations' repositioning entitlements will force alternative cable programming into high-numbered, less valued channels." [64]

[64] *Id.* at 95-96a. Judge Williams also found that carriage under the leased access provisions of the Act, provision of an A/B switch,

SUMMARY OF ARGUMENT

From the cable programmers' perspective, the central vice of must-carry is that it guarantees a governmentally favored class of speaker—local broadcasters—access to television audiences through means that necessarily preclude cable programmers from reaching those same audiences. While cable operators rightfully complain of, *inter alia*, the statute's invasion of their constitutionally protected editorial functions, appellant cable programmers focus their challenge on the governmental decision to promote a favored class of speakers at the expense of cable programmers' right to speak. *See Buckley v. Valeo*, 426 U.S. 1, 48-49 (1976).

1. The record demonstrates that must-carry is not necessary to protect free, over-the-air television broadcasting. To the contrary, the evidence shows that cable operators voluntarily carried virtually all broadcast stations with any measurable viewing (and many stations with no measurable viewing) in the absence of must-carry; that the broadcast industry is healthy and grew markedly during the period without must-carry; and that the majority of broadcasters were so sure that they could secure carriage that they elected to extract ransom for consent to retransmit their signals rather than asserting must-carry rights.

The record also shows, as appellants have always acknowledged, that absent the must-carry provisions, some individual broadcast stations would not be carried on some cable systems. But the vast majority of those stations are neither desired by, nor watched by, viewers, and most are located in the largest television markets where the largest number of broadcast stations already are carried by cable systems. Although the Government now insists that must-carry was designed to protect individual stations, rather

or institution of *Century*-like rules all would address whatever legitimate concern the Government might have in preventing unfair competition, but would impose lesser burdens on the speech of cable programmers and operators. *Id.* at 96-110a.

than the system of broadcasting as a whole, a position Judge Sporkin embraced (J.S. App. 8-9a n.11), there is no merit to that claim. Not only does the Government's newfound argument supplant the express interests articulated by Congress and embraced by this Court in *Turner*, it posits a thoroughly self-evident proposition that renders inexplicable the *Turner* plurality's remand for additional fact-finding to ascertain whether "significant numbers" of broadcast stations would be jeopardized by a lack of must-carry, thereby posing a threat to the broadcast industry. The Government's argument also eliminates the need for narrow tailoring by promoting an entirely circular, self-fulfilling standard, *i.e.*, more is always *better*.

2. The must-carry provisions are fatally overbroad and burden substantially more speech than necessary to advance any legitimate governmental interest. The evidence shows that available channel capacity in cable systems remains limited, that any growth in channel capacity is rapidly filled, and that the number of potential programmer-speakers far exceeds available capacity, both now and for the foreseeable future. Consequently, by ensuring that local broadcast stations have the right to occupy up to one third or more of the channel capacity of local cable systems, regardless of viewer preferences, must-carry has foreclosed cable programmer speech on thousands of cable channels serving millions of potential viewers. Sixty-seven percent of cable subscribers subscribe to systems with no excess capacity, demonstrating that must-carry has made it more difficult for programmers to compete.

3. The evidence also demonstrates that Congress and the FCC have available to them a number of less restrictive alternatives that could be implemented readily if any real problem were to arise needing remedial action. For example, Congress went far beyond the more narrowly tailored *Century* rules without explaining why their requirements were not sufficient to preserve the goals articulated by Congress. As it turns out, a substantial majority of television stations added to cable systems under

the current law would not have qualified for mandatory carriage under the *Century* rules.[65]

4. It is true, as the Court certainly knows, that this case does not present an "all or nothing" proposition. If any real "problem" exists or were to emerge, there is nothing that would prevent the FCC or Congress from enacting a less restrictive aproach immediately. If heightened First Amendment scrutiny is to have any real substantive meaning in this context, then this unsubstantiated, overbroad must-carry regime cannot survive.

ARGUMENT

I. THE GOVERNMENT FAILED TO SUSTAIN ITS BURDEN OF SHOWING ANY REAL THREAT TO THE CONTINUED VIABILITY OF THE LOCAL BROADCAST SYSTEM IN THE ABSENCE OF MUST-CARRY

As the Government and its broadcaster allies now concede, the record developed on remand does *not* show that must-carry is necessary to preserve the Nation's system of free, local over-the-air television broadcasting,[66] nor did Judge Sporkin so find. To the contrary, the evidence shows that cable operators voluntarily carried virtually all broadcast stations with any measurable viewership (and many stations without any measurable viewership) in the absence of must-carry; that the broadcast industry is healthy and grew during the period without must-carry; and that broadcasters were so confident of their ability to obtain carriage that the substantial majority of stations elected to extract ransom for consent to retransmit their signals rather than elect must-carry.

Faced with a lack of evidence showing any legitimate need for must-carry to protect the broadcast industry, the

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[65] Klein Decl., ¶¶ 24-25 (J.A. 1142-43).

[66] *See* Motion of The Federal Appellees To Affirm (Jan. 1996) ("Fed. Motion to Affirm") at 17-18; Motion to Affirm of the NAB and INTV at 13-14.

Government has sought to reposition Congress' asserted interests. The Government now contends that Congress' interest was in promoting the continued cable carriage and economic growth of each individual broadcast station electing must-carry. Judge Sporkin agreed. Notwithstanding the *Turner* plurality's remand instructions directing the district court to ascertain whether "the must-carry rules are necessary to protect the viability of broadcast television" (114 S. Ct. at 2471), Judge Sporkin rejected the notion that "the Court should examine the broadcasting industry *as a whole*," J.S. App. 8-9a n.11 (emphasis in original), and concluded that "[t]he relevant inquiry is whether the health of those broadcasters protected by the must-carry provisions would be in jeopardy without the provisions." *Id.* After redefining the standard of inquiry in this manner, Judge Sporkin proceeded to conclude, based largely on evidence that had already been considered by this Court, that there was "substantial evidence" from which Congress reasonably could have concluded that the must-carry statute is necessary to protect the carriage rights of local broadcast stations. *Id.* at 17-18a.

The Government's newly-minted justification for the must-carry provisions—the protection of each individual broadcast station—cannot be reconciled with the interests identified by Congress and recognized by this Court in *Turner*.[67] Not only does this formulation improperly supplant the express interests articulated by Congress, it posits an entirely self-evident proposition that renders inexplicable this Court's remand for further evidence regarding the health of local broadcasting and the need for must-carry. The Government's reformulation also establishes an entirely self-fulfilling standard—more is always better —that eliminates any need for narrow tailoring.[68]

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[67] *See Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993) (when defending a law subject to heightened scrutiny, the Government must rely on the interest that Congress intended to advance, not one invented for the purposes of litigation).

[68] *See Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 502 U.S. 105, 120 (1991) (positing the effect of a statute as the State's interest "can sidestep judicial review of almost any statute, because it makes all statutes look narrowly tailored"); J.S. App. 88a (noting that "must-carry is by definition narrowly tailored" under appellees' formulation) (Williams, J., dissenting).

The cable programmers concede that absent must-carry, not every broadcaster eligible under the overbroad provisions would be carried. As speakers, cable programmers certainly hope that in some cases, cable subscribers would prefer to receive the speech of a cable programmer rather than that of a particular broadcast station, and that cable operators, in exercising their editorial discretion, would respond to that preference. The issue here is not whether particular broadcasters might benefit from must-carry, but whether the Government has proven that mandatory carriage is necessary to protect the interests of the public in ensuring the widespread availability of over-the-air broadcast television. *See Turner*, 114 S. Ct. at 2470. The Government's present formulation is fundamentally illegitimate and cannot be sustained.

It is true that Congress (or the FCC) does not have to wait until the system of broadcasting is at death's door to make a predictive judgment. If there were substantial evidence that in a significant number of local television markets, the quantity or quality of local broadcasting would erode without must-carry, then the need for must-carry would be a closer case. But here, with no such showing and in light of the First Amendment injury being inflicted, the must-carry provisions are fatally overbroad.

A. Local Broadcast Stations Enjoyed Widespread Cable Carriage In The Absence Of Must-Carry Requirements.

The *Turner* plurality observed that "the Government's assertion that the must-carry rules are necessary to protect the viability of broadcast television rests on two essential propositions," the first being that "unless cable operators are compelled to carry broadcast stations, significant numbers of broadcast stations will be refused carriage on cable systems." 114 S. Ct. at 2471. As support, the Government

maintained that Congress had before it "substantial evidence" to justify a reasonable inference that "significant numbers" of broadcast stations would be denied carriage in the absence of must-carry.[69] Reference to contemporaneous evidence concerning cable carriage, however, leads to the opposition conclusion.

1. The Government has continued to insist that the 1988 FCC Carriage Survey supports an inference that significant numbers of local broadcast stations would be dropped from or denied cable carriage in the absence of must-carry.[70] The Government provided no data to address the *Turner* plurality's concerns regarding the "time frame in which these drops occurred, or how many of these stations were dropped for only a temporary period and then restored to carriage" (114 S. Ct. at 2471). Nor did it supply any information showing what percentage of a station's total viewing audience was affected, or what percentage of local broadcasters in each television market were already being carried voluntarily.[71]

The 1988 FCC Carriage Survey provides only raw information concerning the number of instances that any broadcast station was dropped from or denied carriage on any cable system, for any reason, after the former must-carry rules were invalidated in *Quincy*. Thus, if a duplicative network affiliate had been denied carriage on a cable system that already carried another affiliate of the same network, that event was counted as an adverse carriage action, even though it would *not* have must-carry status under the current law. Even so, for the period examined, nearly 80% of the responding cable systems reported not having dropped or denied carriage to any broadcast station.[72]

[69] Fed. Motion to Affirm at 8-9.

[70] To support this claim, appellees simply reiterate the Survey's finding that as of 1988, 280 broadcast stations had reported being denied carriage on 1,533 occasions. *See* Def. Jt. St., ¶ 36.

[71] Judge Sporkin simply reiterated the carriage figures found insufficient to justify the must-carry provisions in *Turner*, and concluded, without elaboration, that the Survey supported a finding that a "significant number of local broadcasters" had been dropped, refused carriage or adversely repositioned by cable operators. J.S. App. 11a.

Other contemporaneous evidence shows that the vast majority of stations maintained cable carriage in the absence of must-carry, and that the number of station drops was relatively insignificant. For example, the 1991 FTC Staff Analysis, which was available when Congress was considering the must-carry statute, clearly demonstrated the flaws in the 1988 FCC Carriage Survey. Independently examining the FCC's carriage data, the FTC Staff did the analysis that the FCC (and Congress) failed to conduct. The FTC Staff found that "most cable systems voluntarily carry all of their former must-carry stations" and that "[m]ost episodes of non-carriage appear to have involved distantly-located (and duplicated) network signals and relatively low-rated commercial independent stations."[73]

2. Congress' "predictive judgment" is further undermined by the analysis of broadcast station carriage patterns conducted by Dr. Besen, which shows that in 1992,

[72] 1988 FCC Carriage Survey, Table 4 (J.A. 51). Similarly, nearly 70% of the 912 television stations responding reported that they had never been dropped or denied carriage by even a single cable system. *Id.*, Table 3 (J.A. 50).

[73] 1991 FTC Staff Analysis at ii (J.A. 160-61). The Government did not dispute the FTC's findings. Rather, it asserted that the FTC did not consider carriage patterns after 1988; that Congress was acting within its discretion to protect stations with little watched programming; and that other evidence available at the time allowed Congress to "reasonably discount the conclusions in the FTC Staff Report, which was based on limited, dated information." Def. Fact Response at 28-31. These arguments are easily dismissed. The *only* empirical evidence on which Congress relied was the 1988 FCC Carriage Survey, and the 1991 FTC Staff Analysis used the Survey's data to show that Congress could not have reasonably concluded that "significant numbers" of broadcast stations were being dropped from or denied carriage, or that there existed any legitimate threat to the viability of local broadcasting. Moreover, appellees' claim that Congress could "reasonably discount" the 1991 FTC Staff Analysis overlooks the fact that Congress did not "discount" this evidence; rather, there is no evidence that Congress considered the FTC's findings at all.

in the absence of must-carry, cable operators carried virtually all local broadcast stations with any measurable viewing in non-cable homes, and many stations with no measurable viewing. Specifically, Dr. Besen examined two representative samples of cable systems with respect to their carriage patterns in 1992. In order to reflect the stations' "local viewership," Dr. Besen conducted his analysis using each station's 1994 audience shares.[74]

The results of Dr. Besen's analysis show that the local stations carried by the typical cable system accounted for approximately 98% of the viewing by non-cable households.[75] Moreover, over 30% of those stations with *no* measurable viewing in non-cable households were still being carried by cable.[76] Dr. Besen thus concluded that the typical cable system carries those local stations that viewers actually want to watch, even in the absence of a must-carry requirement.[77] In sum, the evidence before Congress simply could not have supported a reasonable conclusion that "significant numbers" of broadcast stations were being dropped or denied cable carriage, thereby posing a threat to the viability of free, over-the-air local broadcasting.

3. As Judge Williams recognized, instances of non-carriage occur primarily in television markets with many television stations.[78] Of the 52 broadcast stations specifically identified by appellees as having been harmed by adverse carriage behavior between 1985 and 1992, 41 of those stations were located in television markets with at least nine *other* broadcast stations in operation.[79] Moreover, the 1991 FTC Staff Analysis found that the proportion of local broadcast stations carried fell as the number of local signals increased.[80] The Analysis found that when three local signals were available, *all* were carried; when nine local stations were available, about six were carried.[81] Judge Williams thus observed that *"those areas with the fewest broadcast stations have the greatest proportion of voluntary carriage and the least need for forced carriage."* [82]

[74] Besen Decl. at 38 (J.A. 806). The use of audience shares from 1994, a period during which must-carry was in effect, eliminates the possibility that a station's ratings may have been diminished due to a lack of cable carriage.

[75] *Id.* at 5, 28 (J.A. 778, 797).

[76] *Id.* at 28 (J.A. 797).

[77] *Id.* at 28-29 (J.A. 797-98). Although appellees disputed Dr. Besen's findings, arguing that there are defects in the viewing data upon which Dr. Besen relied, they offered no alternative figure of their own. *See* J.S. App. 70a (Williams, J., dissenting).

[78] Third Besen Decl. at 20 (J.A. 2043). *See also* Memorandum of *Turner* Plaintiffs In Opposition to Defendants' Motions For Summary Judgment (*"Turner* plaintiffs' Opp. Mem."), App. A; Rebuttal Declaration of James N. Dertouzos, Table A-3, "Correlation Between Number of Stations and Percent Carried" (J.A. 1905) (showing that instances of non-carriage occur primarily in ADIs with eight or more stations).

[79] *See Turner* plaintiffs' Opp. Mem., App. A.

[80] Corrected Memorandum of the United States and the Federal Communications Commission in Opposition to Plaintiffs' Motions For Summary Judgment (June 21, 1995) at 15.

[81] *Id.*

[82] J.S. App. 72a (Williams, J., dissenting) (emphasis in original).

B. The Broadcast Industry Was Healthy And Grew Markedly In The Absence Of Must-Carry.

The second "essential proposition" upon which the must-carry provisions rest is that broadcast stations dropped from or denied cable carriage "will either deteriorate to a substantial degree or fail altogether." *Turner*, 114 S. Ct. at 2471. Justice Kennedy's plurality opinion accordingly called for the development of additional evidence showing that dropped or repositioned broadcast stations "would be at serious risk of financial difficulty," thereby allowing the Court to assess "whether the threat to broadcast television is real enough . . ." to overcome appellants' constitutional challenge. *Id.* at 2472. The *Turner* plurality, for example, found it significant that no evidence had been presented to show that "local broadcast stations have fallen into bankruptcy, turned in their

broadcast licenses, curtailed their broadcast operations, or suffered a serious reduction in operating revenues as a result of their being dropped from, or otherwise disadvantaged by, cable systems." *Id.* This Court should find it even more significant that, despite having had the benefit of extensive discovery, none of this missing information has been proffered by the Government on remand. *See* J.S. App. 56a (Williams, J., dissenting).

1. The record shows that during the period in which the Government claims that "significant numbers" of broadcast stations were being victimized by cable operators, the broadcast industry expanded rapidly. As observed in the exceptionally detailed findings of Judge Williams (J.S. App. 50-51a),[83] during the period 1981-1991, the broadcast industry experienced an overall gain in gross advertising revenue of $3.7 billion in constant dollars. Moreover, there were no extended declines during that period "from which one could draw a reasonable inference that the broadcast industry was in jeopardy of losing its lifeblood. The only sharp decline is that of 1990-91, congruent with the 1990-91 recession beginning in the second half of 1990." *Id.* at 51a.[84] Judge Williams also found that cable's average annual advertising growth and its market share actually declined after *Quincy*, thereby leading him to conclude that "trends in cable advertising suggest that must-carry has little influence on the competition between the two industries for ad revenue." [85]

[83] Judge Williams' findings stand in stark contrast to the opinion offered by Judge Sporkin, which is almost devoid of findings evincing any meaningful, independent consideration of the facts as required by *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989).

[84] Indeed, Judge Williams noted that a representative of appellee INTV "attributed the nascent drop to the recession and concluded that 'the basic fundamentals of independent television are stronger than they have ever been.'" J.S. App. 52a, *quoting* TV Digest, Jan. 7, 1991 (J.A. 111).

[85] *Id.* at 53a. Judge Williams also concluded that the advertising revenues of other competitors to broadcast declined during the

2. The record also demonstrates robust growth in the broadcast industry as measured by the number of television stations. Noting the Government's persistent refrain that Congress had before it "substantial" anecdotal evidence of broadcast harm wrought by the cable industry, Judge Williams found it significant that "the government on remand has not offered an overall count of the number of stations that have fallen into bankruptcy through noncarriage. . . . Indeed, defendants have conceded their inability to show that any station, commercial or public, turned in its license in the period without must-carry." J.S. App. 56 (Williams, J., dissenting) (emphasis in original) (internal citations omitted).

To the contrary, the record shows that during the period between 1985 and 1992, the total number of television stations in operation increased by 22%, with an increase in commercial stations of nearly 24% and an increase in non-commercial stations of approximately 16.5%.[86] Focusing more generally on the period between 1981 and 1992, the record shows that not one of the Nation's television markets had fewer commercial stations available over-the-air in 1992 than in 1981.[87] Indeed, over three-fourths of the Nation's television markets (157

1990-91 recession, and that the total advertising revenues of cable were so diminutive in comparison to the revenues of broadcast that cable could not possibly have posed a threat to the health of broadcasting. *Id.*; *see also* 1991 FTC Staff Analysis at 25 (J.A. 181) (observing that 30% of the carriage denials alleged in the 1988 FCC Carriage Survey "involve[d] commercial independent stations that tended to have very low audience shares even when they were entitled to must-carry status. . . . Denying carriage to stations that viewers seldom watch is not a promising anticompetitive strategy for [acquiring market power in the sale of local advertising]"); Pl. Jt. St. Facts, ¶¶ 83-97 (demonstrating the limited role of advertising in the cable industry).

[86] Besen Decl., Exh. 5 (J.A. 850-53). The total number of television stations during this period grew from 1,235 to 1,506; commercial stations increased from 919 to 1,138 stations and non-commercial stations increased from 316 to 368 stations. *Id.*

[87] *See* Besen Decl. at 71 & Exh. 11 (J.A. 832 & 871-80).

of 209) had *more* local commercial broadcast stations in 1992 than in 1981. Besen Decl., Exh. 11 (J.A. 861-880). Extending that period by two years, from 1981 to 1994, Judge Williams observed that the data shows

> a net growth in stations *every* year. In fact the average net growth of 41 stations per year during must-carry's absence from 1986-91 more than kept pace with the average growth of 39.4 stations per year from 1981-85, with must-carry in effect. If one takes 1981-87 vs. 1988-91 as the appropriate periods, the net annual additions of stations are 46 and 30, respectively. Although this suggests a lesser growth rate in the must-carry gap, annual growth of 2-3% in number of supplying firms is hardly anemic for a mature industry.[88]

Judge Williams thus concluded that "Congress could *not* have reasonably inferred from this that the industry was in decline or even in jeopardy of any material decline." *Id.*

3. Appellees have claimed that a total of 31 broadcast stations went dark between 1985 and 1992. Meek Decl., ¶¶ 76-77 (J.A. 627-28). During that same period, however, there was a net increase of 271 broadcast stations on the air. Besen Decl., Exh. 5 (J.A. 850-53). Of those 31 stations, only 11 were identified as having experienced any history of significant non-carriage.[89] At least 4 of those 11 returned to on-air operation *before* must-carry was enacted in 1992.[90] Appellees' witness thus qualified his testimony by conceding that "it is not possible to say based on the available data that lack of cable carriage was the sole reason for a station's failure. . . ." [91]

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[88] J.S. App. 57a (Williams, J., dissenting) (emphasis in original).

[89] Meek Decl., ¶¶ 79-80 (J.A. 629-31); *see* Plaintiffs' Fact Response, ¶ 65.

[90] *See* Time Warner Entertainment Broadcast Station Rebuttal (June 16, 1995) at 11, 61, 74, & 99 (and source documents cited therein).

[91] Meek Decl., ¶ 79 (J.A. 629).

4. After months of discovery and pounds of submissions, the Government has failed to demonstrate that the recited harms are real, not merely conjectural. The attempt to realign the Government interest involved to protecting marginal broadcast stations is illegitimate. "[P]lainly it is not the purpose of the [Communications] Act to protect a licensee against competition but to protect the public." *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940); *see also Quincy*, 768 F.2d at 1460 ("were the individual broadcasters themselves the object of the Commission's favors, the objective itself would be fundamentally illegitimate").

"The First Amendment mandates that we presume that speakers, not the Government, know best both what they want to say and how to say it." *Riley v. National Fed'n of the Blind of North Carolina*, 487 U.S. 781, 790-91 (1988). If some day, cable operators actually threaten local broadcasting, either the FCC or Congress can act. But now, the rights of programmers as speakers, the rights of operators as editors, and the rights of cable viewers to receive the programming they want, not what the Government mandates, should be paramount.

II. THE MUST-CARRY PROVISIONS FORECLOSE SUBSTANTIALLY MORE SPEECH THAN NECESSARY TO ADVANCE ANY LEGITIMATE GOVERNMENTAL INTEREST

A. Unlike the first time this case was before this Court, the Court is now able to assess "the actual effects of must-carry on the speech of cable operators and cable programmers." *Turner*, 114 S. Ct. at 2472. And, as the post-implementation evidence dramatically shows, concerns prompting challenges to this legislation were not merely theoretical. The must-carry provisions have, in fact, significantly constrained the editorial choices of cable operators and shut down avenues of communication for cable programmers. In many major markets, where there are typically more than a dozen broadcast television stations, the effect of must-carry has been particularly severe. In virtually all markets, the challenged provisions

have had material, foreclosing effects resulting in the abridgment of cable programmers' speech rights. Must-carry has required cable operators to devote substantial numbers of scarce channel slots to broadcasters asserting carriage rights, thus limiting cable programmers' potential audiences by forcing cable networks to compete for carriage on a reduced number of channels.

As the evidence confirms, channel capacity in the cable industry has been, and will continue to be, extremely limited. The average channel capacity of U.S. cable systems is approximately 43 channels,[92] and over 86 percent of cable systems have a capacity of less than 54 channels.[93] Yet, in addition to the growing number of broadcast television stations,[94] there are currently 128 national and 40 regional cable program networks competing for carriage on cable systems.[95] As of early December 1994, 67 percent of cable subscribers—fully two-thirds of the television audience that cable program networks hope to reach—were served by cable systems with *no* available channel capacity.[96]

The undisputed evidence also demonstrates that due to channel capacity constraints, competition among programming providers for carriage on cable systems is fierce;[97] that the must-carry requirements have significantly exacerbated this situation;[98] and that, due to the large and growing number of broadcast and non-broadcast pro-

[92] Shapiro Decl., Exh. 1, Appendix 2 at 9.

[93] Klein Decl., ¶ 8 (J.A. 1137).

[94] *See* Besen Decl. at 73-76 (J.A. 834-36).

[95] Klein Decl., ¶ 7 (J.A. 1137). In addition, numerous additional programming services are at various stages of planning. *Id.* Further, virtually all cable systems are required by local franchise agreements to devote specified numbers of channels to so-called "PEG" uses (public access, educational and governmental channels).

[96] Shapiro Decl., Exh. 1 at 9 (J.A. 662).

[97] *See, e.g.*, Maguire Decl., ¶¶ 22, 26; Symonds Decl., ¶ 7; Green Decl., ¶ 7; Kerr Decl., ¶ 6.

[98] *See, e.g.*, Maguire Decl., ¶ 23; Kerr Decl., ¶¶ 6-9.

gramming providers seeking carriage, this situation will not be alleviated in the near, or even reasonably foreseeable, future.

As of November 1994, cable systems serving over 50 percent of the Nation's cable television audience had been required to *add* must-carry broadcast stations.[99] Moreover, by the end of 1994, between 5,500 and 6,000 broadcast stations had been added to cable systems because of must-carry.[100] Furthermore, numerous additional broadcast stations (both existing and newly-licensed stations) will gain must-carry rights on additional cable systems in the future. Virtually *all* cable systems are carrying commercial broadcast stations that elected must-carry when the statute became effective, thus locking themselves onto cable systems and entirely eliminating cable operators' discretion to choose to replace such broadcast stations with other, perhaps newer, programming services, regardless of viewer preferences.

B. The substantial speech-foreclosing effects of the must-carry provisions on cable programmers are confirmed by the evidence developed upon remand. Without attempting to repeat or summarize the hundreds of specific, concrete examples of First Amendment injury identified in the record, the following examples illustrate the impact on cable programmer speech (and, as well, the overbreadth) of the must-carry provisions.

Numerous cable program networks, including those represented here, have been dropped from cable systems as a direct consequence of must-carry, silencing the dropped programmer's speech and generally leaving the programmer with no other avenue of communicating with its affected audience. For example:

[99] Shapiro Decl., Exh. 2 at 10-11 (J.A. 674) (approximately 53 percent). The systems that were required to add must-carry stations tended to be those with the least available channel capacity. *See id.* at 13 (J.A. 677-78).

[100] Both appellants' and appellees' experts arrived at numbers in this range. *See* Shapiro Decl., Exh. 2 at 11 (J.A. 675); Meek Decl., ¶ 23 (J.A. 624).

• A 37-channel Simmons cable system in Alamogordo, New Mexico dropped C-SPAN after adding a religious broadcaster based in a city 118 miles away. Kerr Decl., ¶ 10.a.

• TKR's Warwick, New York system dropped The Travel Channel to make room for five must-carry broadcasters. The Travel Channel has been prevented from reaching these 18,000 subscribers as a result. Michaelis Decl., ¶ 9.c.

• In June 1994, Lifetime was dropped by TCI cable systems in Kankakee and Coal City, Illinois to make room for a home shopping broadcaster, thereby losing access to 26,000 subscribers. Padalino Decl., ¶ 10.c.

• Lifetime and QVC, as well as four other cable programmers, were dropped by the TCI system in Allen, Texas to accommodate six must-carry broadcast stations. Affidavit of Brendan Clouston, ¶ 6. (J.A. 1058)

• E! was dropped on Century Cable's 25,000-subscriber Yuma, Arizona system, which was required to add a must-carry broadcaster. Although E! had been promised an expansion from part-time to full-time carriage, changes in the copyright laws inspired a formerly uninterested broadcaster to demand carriage rights on the system, bumping E! entirely. Green Decl., ¶ 11.e.

• A 43-channel King Video/Colony cable system in Riverside County/Lake Elsinore, California dropped QVC after adding five must-carry broadcast stations, depriving QVC of access to 55,000 subscribers. Kalick Decl., ¶ 10.b.

C. Cable operators, of course, have strong incentives to avoid subscriber dissatisfaction resulting from the elimination of popular programming, whether broadcast or cable. In numerous instances, therefore, operators have attempted at least to limit the number of outright drops of cable networks by reducing cable networks to part-time status and placing two or three of them on the same channel. For example:

• A&E was forced to share a channel with two other networks after TKR/Tri-System, Piscataway, New Jersey granted carriage to five broadcast stations pursuant to must-carry, affecting nearly 125,000 subscribers. Davids Decl., ¶ 21.e.

• A Continental Cablevision system serving Hollywood and Downey, California reduced QVC to part-time after adding two must-carry stations. Kalick Decl., ¶ 10.a.

• A number of TKR systems serving New Jersey reduced Lifetime to part-time after being required to carry must-carry broadcast stations, which collectively affected approximately 48,000 subscribers. Padalino Decl., ¶ 10.j.-k.

• E! was reduced from full-time to part-time carriage on TCI's system in Hacienda Heights, California following the addition of four must-carry stations, eliminating its distribution to approximately 35,000 subscribers. Green Decl., ¶ 13.a.

• Two TCI systems in Texas, each with approximately 40 channels, placed C-SPAN on part-time carriage from 6 p.m. to 6 a.m. following the addition of a number of must-carry stations, affecting 23,000 subscribers. Kerr Decl., ¶ 10.f.

• C-SPAN was dropped to part time carriage in Cablevision Industries' Saratoga Springs, New York system when it was forced to add WOCD and religious broadcaster WMHX. C-SPAN now shares its channel with Madison Square Garden. Kerr Decl., ¶ 10.e.

D. As this Court unanimously recognized in *Turner*, rules requiring cable operators to set aside a portion of their systems' channels for local broadcasters burden the protected speech of cable programmers by "render[ing] it more difficult for cable programmers to compete on the limited channels remaining." *Turner*, 114 S. Ct. at 2456. Perhaps the more significant impact of must-carry, however, has not been the fact that many cable systems have been forced to eliminate cable programming (through

drops or reduction to part-time status), but rather the broader speech-foreclosing effect of the law on the tens of thousands of cable channels occupied by must-carry stations (whether added or retained). For example:

> • E!'s launch in Cablevision Systems' Norwalk, Connecticut system, which would have allowed 90,000 subscribers to access its speech, was cancelled because must-carry obligations required the system to add two new broadcasters instead. The system already carried seven local broadcasters that had elected must-carry status, and had expanded the carriage of two more local broadcasters to full-time due to must-carry. Green Decl., ¶ 12.b.
>
> • The Travel Channel was scheduled to be launched on Comcast's West Palm Beach, Florida system, but the launch was cancelled when a religious broadcaster 60 miles away demanded must-carry rights as a "local" broadcaster, cutting off The Travel Channel's access to approximately 100,000 subscribers. The system already had five channels occupied due to must-carry, including another religious broadcaster. Michaelis Decl., ¶ 10.a.
>
> • Comcast Cablevision's Pontiac, Michigan system cannot add any of the Cartoon Network, Turner Classic Movies or CNNI/CNN-FN, although the General Manager has acknowledged that the Cartoon Network is "at the top of the subscriber request list," because home shopping broadcaster WADL from Mt. Clemons, MI demanded carriage. Maguire Decl., ¶ 26.e.

Not surprisingly, the speech-foreclosing effect of must-carry has been particularly significant as to newer cable networks such as The History Channel, the Cartoon Network, and the Sci-Fi Channel, despite the very high popularity of some of these newer services.[101] For other proposed or planned services, must-carry was a major factor

[101] Cohen Decl., ¶¶ 12-16; Davids Decl., ¶ 17; Holloway Decl., ¶ 12. *See also* Summary Judgment submissions of plaintiffs Discovery Communications, Inc. and The Learning Channel, Inc. (discussing carriage difficulties of The Learning Channel).

in either killing (*e.g.*, The Game Channel),[102] or at least postponing the launch of (*e.g.*, BET on Jazz, C-SPAN 3),[103] new cable networks.

E. Thus, the evidence presented on remand clearly established that:

> except to the extent that there is excess channel capacity . . . every *benefit* to a broadcast station (through being added or being sheltered against removal) is matched by an *injury* to a cable operator (in lost choice and possibly in lost revenue) and programmer (through being dropped, or, thanks to a broadcaster's must-carry entitlement, not added).

J.S. App. 91-92 (Williams, J., dissenting) (emphasis in original).

The Government's response to the undeniably adverse impact on the protected speech of cable programmers has been to claim that this abridgement is "transitory" because channel capacity in the cable industry is likely to expand in the future. With due respect, this is a tired—and still unjustified—refrain. For years, even prior to the 1992 Cable Act, this claim has been made, yet there has been only incremental—not explosive—growth in channel capacity in recent years.[104] And, most importantly, this expansion of capacity has not nearly kept pace with the growth in the number of broadcast stations, cable program networks, and other programming providers seeking carriage on cable.[105] There can be no dispute—indeed, the Government acknowledges—that for the foreseeable

[102] Sherwood Decl., ¶¶ 5-7.

[103] Symonds Decl., ¶ 5; Lamb Decl., ¶ 9.

[104] *See* S. Rep. No. 102-92 at 3 (noting in June 1991 that "the average cable system offers about 36 channels"). An increase in average channel capacity from 36 channels in 1991 to approximately 43 channels four years later is barely recognizable in view of the much greater increase in the number of broadcast and non-broadcast programming providers.

[105] Klein Decl., ¶ 8 (J.A. 1137); Maguire Decl., ¶ 27; Davids Decl., ¶¶ 8-9.

future, the number of programming services (broadcast and non-broadcast) available to cable operators will vastly exceed the channel capacity of cable systems.[106]

It is no surprise, therefore, that even as some cable systems make the substantial investments required to expand their channel capacity,[107] competition remains fierce for any new capacity that becomes available. As indicated above, the impact of must-carry is, for a number of reasons, a continuously expanding one.[108] In view of the growing number of broadcast stations, regional and national cable program networks, and other potential programming providers seeking carriage on cable systems, the capacity problem clearly will not be "solved" any time soon.[109] In the meantime, the significant abridgement of cable programmers' First Amendment rights caused by must-carry will persist, as it has for nearly three years. The possibility that channel capacity will increase to an uncertain extent in the uncertain future provides no justification for this continuing injury. The statute must be justified on the present record, not on speculation that some day the law might become constitutional. *See Sable Communications*, 492 U.S. at 128-131; *Century*, 835 F.2d at 304-05; *Quincy*, 768 F.2d at 1463.

Hence, because the alleged threat to broadcasters is so speculative, and the must-carry effect widespread, appel-

[106] *See* Klein Decl., ¶ 11 (J.A. 1138); Deposition of Harry M. Shooshan, III at 163 (J.A. 479) (acknowledging that the number of cable programming services seeking carriage on cable systems exceeds the average capacity of cable systems and that this "is likely to be true well into the future").

[107] Klein Decl., ¶ 10 (J.A. 1137-38); Maguire Decl., ¶ 28.

[108] *See* pp. 13-15, *supra*.

[109] Significantly, there is no guarantee that additional capacity deployed by cable operators in the future will be devoted principally to expansion of the number of channels for cable *television* service, rather than the use of upgraded capacity for telephony, computer-related, or other electronic services that cable operators increasingly will be pursuing in the future. *See* "Cable Takes Fresh Angle On Services," *Electronic Media*, May 15, 1995 at 1, 30 (*Turner* plaintiffs' Mem., Exh. I); Klein Decl., ¶ 12 (J.A. 1138).

lees cannot demonstrate that the remedy that was adopted does not "burden substantially more speech than is necessary to further the government's legitimate interest." 114 S. Ct. at 2469. Indeed, Congress fundamentally ignored the rights of programmers when considering the issue of must-carry.[110] All Congress did was indicate that programmers could compete for the channels left over—the First Amendment injury now recognized by this Court.

G. The Government did not truly refute any of the evidence of harm presented by the cable operators and programmers. Rather, the Government argued that regardless of the fact that programmers are dropped or unable to gain carriage under must-carry, the harm to cable speech is not "substantial." It attempted to support this position by making a series of irrelevant calculations that ignored the real issue of how much programmer speech is unable to reach its intended audience. Specifically, the Government calculated the number of must-carry elections that had been made *nationwide* and divided that number into the *nationwide* total number of channels, arriving at the useless figure of "1.2%"—a figure that ignored such factors as the channel capacity on most systems or the geographic areas where the majority of subscribers receive speech.

Judge Williams immediately recognized that the percentages put forward by the Government were "meaningless as measures of the foreclosure effects of must-carry," because "dozens of vacant channels on a handful of several-hundred-channel systems are obviously of no use

[110] The committee reports contain no discussion of the impact of must-carry on cable programmers other than the bald assertion that the legislation "ensures adequate opportunity for cable program services to obtain access to cable audiences." The reports provide no support for this statement other than to state that cable system channel capacity "is likely to continue to expand." H.R. Rep. No. 102-628 at 61. By contrast, the reports emphasize "the harm suffered by local broadcasters when they are not carried," noting that cable operators sometimes "make[] room for the cable-only channel" by "bumping the broadcaster off the system." *See id.* at 51.

to a constrained system of 50 channels that is forced to carry, for example, six must-carry stations." [111]

The Government's "nationwide" statistic, moreover, does not really address the "extent to which the must-carry provisions in fact interfere with protected speech." *Turner*, 114 S. Ct. at 2472. It makes no difference, for example, to a cable subscriber in Arlington, Virginia, where because of must-carry, two home shopping broadcast stations were added to the cable system, and cable subscribers cannot receive any of CNN-FN, the Cartoon Network, E! Entertainment on a full time basis, BET on Jazz, and the Travel Channel, among the programmers on this Brief, and cannot receive many other services as well, that in markets with far fewer stations than Washington, must-carry passed without much effect.

The Government also has argued that because a specific programmer cannot show it would have been the network selected for carriage on the channel occupied by a must-carry broadcaster, no injury has occurred. This position is plain wrong and contrary to the unanimous holding in *Turner*. Moreover, this Court has made clear that a First Amendment injury must be recognized as real when burdens on speech "prevent[] the plaintiff from competing on an equal footing." *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2105 (1995), *quoting General Contractors v. Jacksonville*, 113 S. Ct. 2297, 2304 (1993). *See also Harp Advertising v. Villiage of Chicago Ridge*, 9 F.3d 1290, 1292 (7th Cir. 1993) (" a sprinter required to wear lead weights during a race suffers an injury independent of his inability to prove he would win if allowed to run unencumbered").

III. EFFECTIVE LESS RESTRICTIVE ALTERNATIVES EXISTED THAT WOULD HAVE BEEN FAR LESS OVERBROAD

In answer to this Court's request for findings "concerning the availability and efficacy of constitutionally acceptable less restrictive means," *Turner*, 114 S. Ct. at 2472, appellants offered at least five alternatives, *all* of which could have achieved Congress' stated goals with far less impact on protected speech and in a much more "direct and material" way. Although the Government carries the burden to prove why Congress had to go beyond less intrusive means to achieve its objective, *see, e.g., Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1592 (1995); *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1016-17 (1995), both the Government and Judge Sporkin summarily dismissed all the alternatives as "less effective," albeit less restrictive.

Part of the Government's failure to offer any meaningful analysis of the alternatives stemmed from its "self-validating concepts of 'harm.'" J.S. App. 89a (Williams, J., dissenting). Under this approach, no alternative offered by the programmers could achieve Congress' "interest" as effectively as must-carry. As Judge Williams observed, however, if Congress' interests were those the Government maintains—to "maximize broadcast's wealth in the interest of increased expansion and quality of programming" and "assist whatever stations might elect it" (*id* at 88a)—then must-carry would be "by definition narrowly tailored, just as the harm itself exists by definition." *Id.* Any alternative that did not protect the same number of broadcast stations (and thus necessarily burden the same amount of cable speech) would be unacceptable by definition. In this situation, however, a remand would not have been necessary, *see id.* at 88-89a, nor would the narrow tailoring prong of *O'Brien* have any utility.

A. The Century Rules.

When Congress passed the 1992 Cable Act, numerous obvious—indeed, "off the rack"—alternatives existed that would have been more than adequate to protect local broadcasting. Particularly notable was the lack of any showing of inadequacy—or even consideration—by Congress of the *Century* rules, sponsored by, *inter alia*, the broadcasters and the FCC as sufficient to preserve over-

[111] J.S. App. 91a n.23 (Williams, J., dissenting).

the-air television. Yet the differences between the *Century* rules and the much broader must-carry requirements of the 1992 Cable Act account for approximately 85 percent of the burden on programmer speech.[112]

The *Century* rules were based on a "Joint Industry Agreement" that was negotiated and developed by representatives of both the cable and broadcast industries, including appellees NAB and INTV, who each forcefully urged the rules' adoption, because they served to "promote diversity of media voices and viewpoints in the broader television marketplace," [113] and allowed subscribers to retain access to free local television "to the fullest extent . . . practicable and consistent with the *Quincy* decision's perception of cable's First Amendment discretion." [114]

In addition to appeasing the broadcasters' concerns about survival, the *Century* rules also would have imposed far lesser restrictions on cable programmer speech. They restricted the burden on speech, because they were drawn more narrowly in terms of geographic scope and impact.[115] Most importantly, the *Century* rules reflected viewers' preferences by containing a minimum viewership standard for must-carry eligibility.[116] However, the statute Congress passed sweeps far beyond these requirements, without any Congressional finding regarding the need for additional burdens on cable speech.

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[112] Klein Decl., ¶ 25 (J.A. 1142-43).

[113] Comments of the National Association of Broadcasters, MM Docket No. 85-349 (April 25, 1986) at 7 (*Turner* plaintiffs' Mem., Exh. L).

[114] Further Comments of Association of Independent Television Stations, Inc., MM Docket No. 85-349 (April 25, 1986) at 15 (*Turner* plaintiffs' Mem., Exh. M).

[115] *See* pp. 15-16, *supra*.

[116] *See, e.g.*, Further Comments of INTV at 14 (the Joint Industry Agreement "guarantees that no cable system will be required to carry any television station that is unwanted by its viewers").

The record on remand demonstrates that these distinctions were quite important to the statute's impact on speech. Had *Century*-type rules been adopted in 1992, instead of the existing must-carry statute, 85% of the new station additions would not have been required.[117]

Judge Sporkin dismissed the *Century* rules with the cursory and circular finding that they "would not come close to providing the coverage as that provided by the 1992 Cable Act rules." [118] The relevant issue, however, was not whether the rules protected the same number of broadcasters, but whether they were an "equally effective" means of addressing Congress' interest in protecting free local broadcast television. By failing to proffer a baseline for measuring the health of local broadcasting, the Government has made it impossible to find that the must-carry law constitutes an "effective" fit with Congress' interest in broadcast preservation.

B. A/B Switches.

Another viable alternative to must-carry would be to allow subscribers to access broadcasting and cable independently through "A/B switch" technology. This option should be particularly appealing to the broadcasters, since it effectively removes the one-third must-carry cap and guarantees access to *all* broadcasters in the area. For a more complete discussion of this issue, appellants respectfully refer the Court to the Brief being filed con-

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[117] Klein Decl., ¶ 25 (J.A. 1142-43). Among a representative sample of cable systems, to which 270 broadcast stations were *added* pursuant to the must-carry provisions of the Cable Act, only 37 would have been required to be added under the *Century* rules. *Id.*, ¶¶ 24-25 (J.A. 1142-43). 48 of the remaining 232 stations were located more than 50 miles away from the system, and thus could not have been considered "local," while 18 more would not have been added because the cable system already carried local broadcasters on 25% of its channels. *Id.* The remaining 116 stations could not have met the minimum viewership standard contained in the *Century* rules to merit carriage.

[118] J.S. App. 23a.

currently by Discovery Communications, Inc. We note only two quick points.

First, the real world viability of the A/B switch as an alternative was proven in Corpus Christi, Texas, where, when several broadcasters and the local cable operator could not reach a retransmission consent agreement, the cable operator was prevented from carrying the broadcasters and distributed A/B switches so that its customers could still access popular broadcast programming. Subsequent customer surveys proved nearly universal satisfaction with this approach, and the stations' ratings were unaffected.[119]

Second, to the extent customers nonetheless find switches a less convenient solution, "government-mandated carriage seems a rather astonishing solution to a problem now redefined as consumers' occasional need to 'get up.'" J.S. App. 106a (Williams, J., dissenting). In the absence of any meaningful argument that A/B switches do not address Congress' concerns for protection of the broadcast industry, A/B switches must be considered a viable alternative to the must-carry requirements.

C. Leased Access.

In light of the fact that the vast majority of broadcasters watched by non-cable households, accounting for 98% of the total local television stations' viewership (Besen Decl. at 5, 28; J.A. 778, 797), were already carried voluntarily by cable systems prior to the enactment of must-carry, it would have been a reasonable alternative to require the few remaining broadcasters to seek carriage on cable systems through the leased access provision of the Act (47 U.S.C. § 532). While providing nondiscriminatory access at a price set by an administrative agency is a frequently used solution in many fields, such as the gas and electric industries, no other industry in a comparable situation is allowed free access to a medium, particularly in the face of the First Amendment. As Judge

[119] *See* p. 17, *supra*.

Williams observed, "[i]f carriage generates for broadcasters the enormous incremental revenues that defendants claim, it is especially odd to find them disparaging the idea that they should pay any of the costs of access to this bonanza." J.S. App. 100a (Williams, J., dissenting).[120]

D. Antitrust Or Administrative Complaint Procedures.

Enforcement of the antitrust laws would provide a far less restrictive means of preventing the alleged anticompetitive behavior of cable operators, to the extent any was found to exist. Given that 98% of broadcasters watched in non-cable households are carried by cable systems without any protections in place, additional protection—if any were needed—to ensure the survival of free television could be provided easily through enforcement of existing laws. Regardless of whether or not it would be less expedient to pursue antitrust remedies, the First Amendment "does not permit [the government] to sacrifice speech for efficiency." *Riley*, 487 U.S. at 795.

A concededly less expensive and faster option would be the creation of an administrative complaint procedure before the FCC. The broadcasting industry itself suggested to the FCC in 1994 that such an approach "would provide stations with a remedy similar to that which might be available in an antitrust suit but with lower costs and without many of the difficulties involved in antitrust litigation, such as establishing a market definition."[121] Similar procedures have been used successfully to implement the program access provisions of the 1992 Cable Act, where complaint proceedings are used in situations where a competing multichannel distributor is allegedly unable to obtain access to a cable programming service, and to handle

[120] The Government also contended that any option that costs broadcasters money cannot be "equally effective" at protecting their interests. This reasoning, however, is another result of its "self-validating concepts of 'harm,'" J.S. App. 89a (Williams, J., dissenting) and, as explained above, cannot be sustained.

[121] NAB Doc. 4010738 (*Turner* plaintiffs' Mem., Exh. V).

broadcaster complaints arising under the broadcast network-cable cross-ownership provisions.

E. Government Subsidies.

As Justice O'Connor recognized, Congress also could address its concerns for the preservation of the broadcast industry by providing subsidies to needy broadcasters. *Turner*, 114 S. Ct. at 2480 (O'Connor, J., concurring in part and dissenting in part). Judge Sporkin rejected this alternative because he was "simply unable to make an informed analysis of this proposed alternative" due to a lack of "significant details," [122] including whether Congress might find the "complex determinations as to who to subsidize, how much the subsidy would be and when the subsidy would end" [123] too difficult and whether Congress would be "guaranteeing the continued existence of a broadcast station which would not otherwise have been able to survive," [124] a particularly ironic concern given that the definition of harm advocated by the Government necessarily achieves this direct result.[125] At the very least, consideration of this alternative by Congress would have resulted in the "details" supposedly lacking here.

Finally, even if the Court could conclude that the interest in protecting little watched broadcasters was substantial, and represented a real harm to be addressed, and even if the Court also could conclude that the harm the statute inflicts upon cable operators and cable programmers was an acceptable burden on speech, the statute still

[122] J.S. App. 26a.

[123] *Id.* at 25-26a.

[124] *Id.* at 26a.

[125] Judge Sporkin asserts that the must-carry rules "do not guarantee the financial viability of the broadcast industry or any of its members." *Id.* If this is true, then the statute cannot be found to be narrowly tailored because the Government did not prove "that the viability of the local broadcast industry would be jeopardized in the absence of must-carry rules," *id.* at 3a, a burden which this Court had imposed. *Turner*, 114 S. Ct. at 2471.

must fall because it is not crafted to ensure the carriage of that narrow segment of stations. In other words, even if everything the Government says is right, Congress still passed the wrong statute.

The statute does not mandate that a cable operator carry all qualified local broadcast stations. Instead, it caps the operator's obligations at one-third of the system's capacity.[126] The average channel capacity of cable systems in the United States is approximately 43 channels,[127] yet most of the top television markets have more than 14 television stations. If there are eligible stations beyond the number an operator needs to carry, we think it is undeniable that the cable operator will choose not to carry the stations that subscribers want the least: the marginal, little-watched television stations that the Government now claims are the objective of must-carry.[128]

In sum, even if one would believe everything appellees say, the statute is still an ill-fitting mechanism to achieve the Government's new-found objective. In fact, this point really suggests that the new focus on marginal stations is just a makeweight attempt to save the statute from being struck down. This is then not a case of this Court second-guessing Congress' judgment. *Compare Board of Trustees v. Fox*, 492 U.S. 469, 478 (1989). It is a case where, in light of the "numerous and obvious less burdensome alternatives" that exist, the fit between the end and means is

[126] Furthermore, any stations that an operator decides to carry under the retransmission consent provisions of the Act count against the operator's one-third of capacity cap. *See In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, Notice of Proposed Rulemaking*, 7 FCC Rcd. 8055, 8067 (1992) & *Report and Order*, 8 FCC Rcd. 2965, 3003 (1993).

[127] Shapiro Decl., Exh. 1, App. 2 at 9.

[128] *See, e.g., Complaint of Fouce Amusement Enterprises, Inc. against Community Cablevision Company*, 10 FCC Rcd. 1051 (Feb. 1, 1995) (refusing to mandate carriage of broadcast signal since system already carried maximum number of must-carry stations).

highly unreasonable. *See City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993); *Coors*, 115 S. Ct. at 1593-94.

CONCLUSION

At bottom, we think that this remains a simple case that turns on a handful of facts. Congress' recited harms remain merely conjectural, not real. *See Edenfield*, 113 S. Ct. at 1800. The remedy chosen to solve this imaginary problem is horribly overbroad. If there is a problem here, or one later develops, other more tailored solutions remain available. These must-carry provisions represent special interest legislation, not public interest legislation, and should be struck down.

Respectfully submitted,

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April 26, 1996